UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	Criminal No. 94-42-B-S
	)	Civil No. 01-198-B-S
	)	
DENNIS SULLIVAN,	)	
	)	
Defendant	)	
	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Dennis Sullivan has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Docket No. 79.) The United States has responded with a motion to dismiss. (Docket No. 84.) I now recommend that the court **DENY** Sullivan's petition.

Factual Background

Sullivan and his co-defendant Thomas Platt were charged in a seven-count indictment with a series of offenses in connection with the armed robbery of a motel and the possession of firearms in violation of federal statutes. Ultimately, on April 3, 1995, a jury found Sullivan guilty on three counts of the indictment. On June 23, 1995, he was sentenced on Counts One and Two, conspiracy to obstruct commerce in violation of 18 U.S.C. § 1951 and using a sawed off shotgun in a threatening manner in violation of 18 U.S.C. § 1951 and 18 U.S.C. § 2. He was also sentenced on Count Three, for using and carrying a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) and

18 U.S.C. § 2. He received 210-months concurrent imprisonment on Counts One and Two, followed by a consecutive 120-month term on Count Three.

Sullivan appealed, contending, inter alia, that there was insufficient evidence to convict him of the Count Three allegations of using or carrying a firearm in relation to a crime of violence and aiding and abetting the same because he was acquitted on other firearms counts charging him with possession of a firearm by a felon and possession of an unregistered firearm. United States v. Sullivan, 85 F.3d 743 (1st Cir. 1996). Sullivan argued that because the undisputed evidence was that the shotgun belonged to Platt, there was insufficient evidence to convict him of using or carrying a firearm as alleged in Count Three. The First Circuit easily distinguished cases such as United States v. Spinney, 65 F.3d 231(1st Cir. 1995) where an accomplice's conviction had been vacated, because, unlike the handgun in Spinney, a "sawed-off shotgun is hardly inconspicuous." Sullivan, 65 F.3d at 748; see also Spinney, 65 F.3d at 238-39. Thus the appellate court concluded: "The jury could have found actual knowledge and thus could easily have found that Sullivan knew to a 'practical certainty' that the gun would be used." Sullivan, 65 F.3d at 748 (quoting Spinney, 65 F.3d at 238).

No further appellate proceedings occurred and Sullivan's mandate was entered in this court on June 25, 1996. On October 9, 2001, Sullivan filed a motion to vacate pursuant to 28 U.S.C. § 2255. (Docket No. 79.) After some preliminary clarification, the United States was ordered to answer.

Sullivan relies upon Castillo v. United States, 530 U.S. 120 (2000) to argue that the 18 U.S.C. § 924(c) statutory references to certain firearms, such as machine guns or sawed-off shotguns, define separate offenses and must be pled and proven separately in

order to invoke the harsher penalties associated with the statutory scheme, including the ten-year consecutive imprisonment imposed in this case.[1] Sullivan requests that his sentence be vacated and that he be resentenced to no more than 322 months. He arrives at this figure because his guideline sentencing range for the principal offense was 210 - 262 months. (Pet. Mem. at 9.) Sullivan argues that even if he had been sentenced at the high end of the guideline range, the maximum consecutive sentence he could receive for the Count Three offense under Castillo would have been five years, resulting in a total maximum period of imprisonment of 322 months.

Discussion

Pursuant to 28 U.S.C. § 2255 a motion to vacate must be filed within one year of the following:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;
>
> (4) the date on which the facts supporting the claim or claims could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 ¶ 6.

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[1] Sullivan was convicted under the same, pre-1998 version of 18 U.S.C. § 924 that was Castillo. It read:

> "(c)(1) Whoever, during and in relation to any crime of violence ..., uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence ..., be sentenced to imprisonment for five years, and if the firearm is a short barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years." 18 U.S.C. § 924(c)(1) (1988 ed., Supp. V).

Castillo, 530 U.S. at 122. The statute has since been amended.

Sullivan contends that Castillo, 530 U.S. 120, decided June 5, 2000, places his case squarely within ¶ 6(3), because Castillo applies retroactively to cases on collateral review. There is no First Circuit precedent on this precise point. However, even if I were to assume arguendo that this petition is somehow timely under ¶ 6(3), Sullivan is not entitled to relief.

As a preliminary matter, I note once again the difference in language between ¶ 6 and the language found in ¶ 8 of 28 U.S.C. § 2255. While it is clear that Sullivan could not bring his Castillo challenge if this were a ¶ 8 second or successive petition, there is no pat answer as to whether Sullivan can bring his Castillo claim in his initial, but otherwise untimely, habeas. The United States asserts in its response that Sullivan can not raise Castillo because the Supreme Court has not made the holding of Castillo retroactive to cases on collateral review, citing In re Tatum, 233 F.3d 857, 859 (5th Cir. 2000). Though, without a doubt, the Supreme Court has not held that Castillo should be retroactively applied to cases on collateral review,[2] as relevant to the inquiry under ¶ 8(2) for second and successive § 2255 motions, see Tyler v. Cain, 533 U.S.656 (2001) (interpreting 28 U.S.C. § 2244(b)(2)(A) that, like 28 U.S.C. § 2255 ¶ 8(2), turns on the language, "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"), this is a different standard than the criteria resident in § 2255 ¶ 6(3). See Ashley v. United States, 266 F.3d 671, 673 (7th Cir. 2001) (distinguishing 28 U.S.C. § 2255 ¶ 6(3) from § 2255 ¶ 8(2)).

[2] The Castillo case was a direct appeal involving members of the Branch-Davidian sect who contended, among other things, that the use of a machinegun or other enhanced weapons involved an element of a substantive crime, not a sentencing factor to be determined by the court after trial.

The precedent most likely to excuse Sullivan's untimeliness would be Bousley v. United States, 523 U.S. 614 (1998), a case holding that Supreme Court opinions interpreting criminal statutes adopted by Congress should be applied without need to resort to the Teague v. Lane, 489 U.S. 288 (1989) retroactivity analysis for new rules of constitutional law. Bousley, 523 U.S. at 620 ("[B]ecause Teague by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress."). However, the question of whether the appropriate timeliness analysis is pegged to Bousley or Teague is not determinative because even if Sullivan's claim is susceptible to retroactive application he still must leap the "significant procedural hurdles" resulting from his appellate waiver of the claim before the petition can be considered on its merits. See Bousley, 523 U.S. at 621 (guilty plea).

In this instance Sullivan has procedurally defaulted his claim irrespective of his Bousley/Teague § 2255 ¶6 statute of limitations concerns. Though Sullivan raised the claim at trial he abandoned it in his appeal, thus "waiving" the claim for the purposes of collateral review. See Prou v. United States, 199 F.3d 37, 42 n.2 (1st Cir. 1999).[3] "Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal." Bousley, 523 U.S. at 620 (citations and quotations omitted). Since Sullivan attempts to raise an issue in a habeas petition that he could have raised on direct appeal, he must first demonstrate either "cause" and actual "prejudice" vis-à-vis this shortfall,

[3] The Prou Court distinguished the concept of a procedural default from that of waiver: "Technically, this case involves a procedural default, in which a failure seasonably to raise a claim bars subsequent attempts to do so. Waiver, in contrast, represents an express decision by a party not to pursue a claim. Because all waivable claims are by definition subject to procedural default, we use the terms interchangeably." Id.

Murray v. Carrier, 477 U.S. 478, 485 (1986), Wainwright v. Sykes, 433 U.S. 72, 87 (1977), or that he is "actually innocent" of the 18 U.S.C. § 924 (c) offense, Schlup v. Delo, 513 U.S. 298, 327–28 (1995); Murray, 477 U.S. at 496.

It is of some moment that Sullivan's trial counsel raised the issue of whether the ten-year mandatory sentence enhancement was applicable since the sawed-off shotgun issue had not been presented for the jury's determination. (See Sentencing Tr. at 9.) However, according to the First Circuit, the issue was never raised by Sullivan or Platt in their direct appeal. Sullivan, 85 F.3d at 747. The claim, though perspicacious (and potentially effective), was dropped (or fumbled). In order to raise the issue now, Sullivan must show cause and prejudice or actual innocence and he can do neither.[4]

Sullivan's cause and prejudice argument flounders on the requisite first prong of the cause and prejudice showing; a flaw that is especially glaring in light of the fact that trial counsel highlighted the pivotal issue at sentencing. Sullivan contends that his appellate counsel did not follow-up on the Castillo-esque claim because "the issue had little chance of success under existing First Circuit authority." (Form § 2255 Mot. at 6, ¶ 13.) Trial counsel cognizably raised the sentencing factor/element of the crime concern in this case. The First Circuit had discussed the 18 U.S.C. 924(c) element/sentencing factor uncertainty in United States v. Melvin, 27 F.3d 710 (1st Cir. 1994), a case in which at sentencing the judge had concluded that he had erred by not submitting the question of the type of the firearm to the jury. 27 F.3d at 714. Melvin issued on June 22, 1994, and

[4] Sullivan's 28 U.S.C. § 2255 counsel does not attempt to argue that Sullivan could demonstrate cause and prejudice or actual innocence. It seems that counsel conceptualized the concern as only requiring that Sullivan overcome the 28 U.S.C. § 2255 ¶6(1) untimeliness of this petition. However, nothing is lost because nothing could be gained in this late stage by additional legal argument on Sullivan's behalf in this case.

Sullivan's appeal was heard on April 5, 1996. Melvin and a Ninth Circuit case, United States v. Alerta, 96 F.3d 1230 (9th Cir. 1996) (decided September 23, 1996) (overruled on other grounds by United States v. Norby, 225 F.3d 1053, 1059 (9th Cir. 2000)) were noted by the Supreme Court in Castillo to support its argument that its conclusion was not a novelty. Castillo, 530 U.S. at 127. See also United States v. Mojica-Baez, 229 F.3d 292, 331 n.12 (1st Cir. 2000) (observing the availability by 1995 of the 18 U.S.C. § 924(c) element of the crime argument vis-à-vis a 1997 crime and noting that the defendant had "great incentive to raise the issue" due to opinions discussing whether victim bodily injury was an element of the crime in the federal carjacking statute); United States v. Pena-Lora, 225 F.3d 17, 31 (1st Cir. 2000) (citing Melvin with regard to a Castillo claim that was not raised at trial, noting that the claim was available and it would not "necessarily" be futile to raise it at trial). The issue was not so novel as to raise appellate counsel's failure to pursue it to the level of "cause."[5] Furthermore, the Bousley court made clear that futility, namely a claim's unacceptability to a particular court at that

[5] Sullivan does not meet the prejudice prong of the showing necessary to overcome a procedural default either. Although if one assumes that failing to plead and prove the type of firearm beyond a reasonable doubt is in the nature of an Apprendi violation, see Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), then Sullivan's sentence did exceed the default statutory maximum. The First Circuit has determined that "no Apprendi violation occurs when the district court sentences a defendant below the default statutory maximum, even though [the specific element of the offense] determined by the court under a preponderance-of-the-evidence standard, influences the length of the sentence imposed." United States v. Robinson, 241 F.3d 115, 119 (1st Cir. 2001). A conviction under 18 U.S.C. § 1951 carries a maximum sentence of twenty years (240 months) imprisonment. The guideline sentencing range was computed at 210 to 262 months. Pursuant to Guideline 5G1.1 (c) (1), the maximum sentence Sullivan could have received would have been the statutory maximum. The sentence he received, 210 months, did not exceed the statutory maximum. A conviction under 18 U.S.C. § 924 (c) (Count Three) carries a default maximum of five years (60 months), without any enhancement for the type of weapon involved in the crime of violence, consecutive to the sentence on the underlying crime of violence. Thus the statutory maximum sentence (as opposed to guidelines computation) for both offenses was 300 (240 + 60) months. Sullivan was sentenced to 330 (210 + 120) months. However, Sullivan is actually arguing a defective indictment and/or a failure to properly instruct the jury under Castillo. It appears that even if this were a direct appeal Sullivan could not show prejudice in the sense of an "error affecting substantial rights test" because a properly instructed jury could not have reached any contrary result about the sawed-off shotgun based upon the evidence as recited in the First Circuit opinion. See United States v. Colon-Munoz, 192 F.3d 210, 211-22 (1st Cir. 1999).

particular time, does not amount to cause. 523 U.S. at 622. The First Circuit has so stated in the context of direct appeals involving defaulted Castillo claims. Mojica-Baez, 229 F.3d at 311 n.12; Pena-Lora, 225 F.3d at 31.

Under the principals annunciated in Edwards v. Carpenter, 529 U.S. 446 (2000) Sullivan would have an outside chance of resurrecting his Castillo claim if he could revive an ineffective assistance of counsel claim from its 28 U.S.C. § 2255 ¶6 untimeliness and successfully demonstrate that his appellate counsel's ineffectiveness caused the waiver of the Castillo claim. See 529 U.S. at 451-52 (addressing the need to exhaust ineffective assistance claim in state court prior to bringing it in a 28 U.S.C. § 2254 petition to establish cause for the default of a second ground). However, Sullivan would have to first demonstrate an ineffective assistance claim before he could use it as a bootstrap for his habeas Castillo claim. Sullivan did not file a timely § 2255 ineffective assistance (of appellate counsel) claim and he does not now assert (an untimely) one. While the Edwards state court exhaustion concerns do not arise in the context of this § 2255 petition, the one-year statute of limitations operates just as surely as a bar preventing Sullivan from attempting to raise an ineffective assistance of appellate counsel claim at this juncture.

Failing on a cause showing, Sullivan must, therefore, be able to mount credible evidence that he is "actually innocent" of the firearm enhancement. If his petition contained any factual basis to support a claim of "actual innocence" he would be entitled to an evidentiary hearing on that question. Bousley, 523 U.S. at 623. To establish 'actual innocence' Sullivan must demonstrate that in light of all the evidence "it is more likely than not that no reasonable juror would have convicted him." Schlup, 513 U.S. at 327 –

28. The facts in the present case support only one conclusion, that the gun used in the armed robbery was a sawed-off shotgun. That fact has never been disputed in any of the pleadings, including the factual summary prepared by Sullivan in support of this petition. See cf. Mojica-Baez, 229 F.3d at 306-12 (pre-Castillo case, decided after the Castillo decision was announced, that applied plain error review to defective indictment that did not allege the specific type of firearm used in the crime of violence, concluding that evidence was sufficient to support the 18 U.S.C. § 924(c) conviction involving use of a semi-automatic assault weapon); Pena-Lora, 225 F.3d at 31 (plain error review of Castillo claim, concluding that there was uncontradicted evidence that an UZI was used to threaten). The First Circuit's sufficiency of the evidence discussion in its decision on the direct appeal further supports this conclusion. See Sullivan, 85 F.3d at 747-48.

To the extent that Sullivan claims that even if there was no trial error there was a failure to satisfy Castillo in the indictment, that claim has no vitality. This claim has also been procedurally defaulted. Though efforts have been made to distinguish an indictment frailty from a trial error frailty for purpose of surviving a procedural default, they have been to no avail. See Mojica- Baez, 229 F.3d at 311-12 (Castillo defect in indictment subject to harmless error review); see also United States v. Thomas, 274 F.3d 655 (2nd Cir 2001) (en banc) (overruling United States v. Tran, 234 F.3d 798 (2d Cir.2000) that held the failure to include the element of the type of firearm used or carried in a 18 U.S.C. § 924(c) violation was jurisdictional error and thus not subject to plain error review, concluding plain error review was proper standard); McCoy v. United States, 266 F.3d

1245, 149-51 (11th Cir. 2001) (Apprendi defect in indictment is subject to plain error review).[6] The Count Three indictment of Sullivan reads:

> [D]efendant[] herein, knowingly used and carried a firearm, a Harrington & Richardson 12 gauge shotgun, serial number 223723, during and in relation to a crime of violence for which [he] may be prosecuted in a court of the United States, namely, the offenses charged in Count One and Two of this superseding indictment, and did aid and abet such conduct.
>
> All in violation of Title 18, United States Code, Sections 924(c) and 2.

(Docket No. 10 at 4.) Count Four further put Sullivan on notice that the United States intended to prove that Sullivan's crime involved a sawed off shotgun. It indicated that his co-defendant Platt was charged with knowing possession of "a firearm, (a weapon made from a shotgun with an overall length of less than 26 inches or a barrel of less than 18 inches in length." (Id.) I conclude that Sullivan's challenge to the indictment is not viable.

In sum, Sullivan's trial counsel raised an important issue. Appellate counsel did not pursue the matter. During the first year following the First Circuit's entry of judgment in this matter, Sullivan could have proceeded with an ineffective assistance claim against appellate counsel. After all, the Ninth Circuit's Alerta case was decided on September 23, 1996, less than four months after Sullivan's appeal was denied and the First Circuit's Melvin stood on the books for years preceding the appeal. Now Sullivan's § 2255 counsel wants me to ignore the waiver of the issue on direct appeal and apply de

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[6] With respect to any assertion by Sullivan that Apprendi v. New Jersey, 530 U.S. 466 (2000) somehow gives his claim additional succor, the Castillo treatment of 18 U.S.C. § 924(c) interpreting the statute to include the operative weapon as an element of the offense means that the constitutional rule of Apprendi is inapplicable to § 924(c). When § 924(c) is properly applied in keeping with Castillo there can be no independent Apprendi error. Sullivan's claim is that § 924(c)(1) was not properly applied in keeping with Castillo; that is the graveman of this petition.

novo review in the face of Mojica-Baez and Pena-Lora because trial counsel raised the issue in this case. (Pet.'s Mem at 8 (Docket No. 76).) At this late stage of the game the interest in finality is strong and often trumps 'legal error' in trial proceedings when that error is first advanced for review as grounds for relief in collateral proceedings. Bousley, 523 U.S. at 621. By waiving the issue in his direct appeal and failing to assert an ineffective assistance claim against his appellate counsel[7] in a timely 28 U.S.C. § 2255 motion, Sullivan has not shown that he is entitled to reap the benefits of the Castillo ruling.

Conclusion

Based upon the foregoing, I recommend that Sullivan's motion pursuant to 28 U.S.C. § 2255 be DENIED.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

[7] I do not mean to suggest one way or the other whether Sullivan could have met the Strickland v. Washington, 467 U.S.1267 (1984) standard and mounted a successful ineffective assistance claim against appellate counsel. Perhaps this is one of those cases which falls within the problematical scenario noted in Sustache-Rivera v. United States, 221 U.S. 8, 14 n.9 (1st Cir. 2000).

January 18, 2002

Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court

District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 94-CR-42-ALL

USA v. PLATT, et al Filed: 12/15/94

Dkt# in other court: None

Case Assigned to: Judge GEORGE Z. SINGAL

THOMAS PLATT (1) JOHN A. CIRALDO

defendant 774-2635

[term 06/30/95] [COR LD NTC]

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Pending Counts: Disposition

18:1951.F EXTORTION, Imprisonment for a term of 262

RACKETEERING, & THREATS months on Ct 6 and 120

(1s - 2s) months on Cts 1,2,4 to be served concurrently. 120 months on Ct 3 to be served consecutively for a total prison term of 382 months. Deft remanded to custody of USMarshal. Supervised release of 5 years on Ct 6 and 3 yrs on Cts 1,2,4 to be served concurrently. Special Assessment of $250 and Restitution of $210 (1s - 2s)

18:924C.F FIREARMS Imprisonment for a term of 262

(3s) months on Ct 6 and 120 months on Cts 1,2,4 to be served concurrently. 120 months on Ct 3 to be served consecutively for a total prison term of 382 months. Deft remanded to custody of USMarshal. Supervised release of 5 years on Ct 6 and 3 yrs on Cts 1,2,4 to be served concurrently. Special Assessment of $250 and Restitution of $210 (3s)

26:5861D.F FIREARMS & WEAPONS Imprisonment for a term of 262

(4s) months on Ct 6 and 120 months on Cts 1,2,4 to be served concurrently. 120 months on Ct 3 to be served consecutively for a total prison term of 382 months. Deft remanded to custody of USMarshal. Supervised release of 5 years on Ct 6 and 3 yrs on Cts 1,2,4 to be served concurrently. Special Assessment of $250 and Restitution of $210 (4s)

18:922G.F FIREARMS Imprisonment for a term of 262
(6s) months on Ct 6 and 120 months on Cts 1,2,4 to be served concurrently. 120 months on Ct 3 to be served consecutively for a total prison term of 382 months. Deft remanded to custody of USMarshal. Supervised release of 5 years on Ct 6 and 3 yrs on Cts 1,2,4 to be served concurrently. Special Assessment of $250 and Restitution of $210 (6s)
Offense Level (opening): 4
Terminated Counts: Disposition
18:1951.F EXTORTION, RACKETEERING, & THREATS
(obstruction of commerce by robbery)
(1)
18:924C.F FIREARMS (use of firearm during crime of violence)
(2)
26:5861D.F FIREARMS & WEAPONS (possession of sawed off shotgun not registered)
(3)
18:922G.F FIREARMS (felon in possession)
(5)
Offense Level (disposition): 4
Complaints: NONE

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Pending Counts: Disposition

18:1951.F EXTORTION, RACKETEERING, & THREATS (1s - 2s) Imprisonment of 210 months on Counts 1s & 2s, to be served concurrently, and a term of 120 months on Ct 3s, to be served consecutively to terms imposed on Cts 1s & 2s, for a total of 330 months; Deft remanded to custody of USM; Supervised Release of 3 years on each of Cts 1s & 2s,all to run concurrently; Special Assessment of $150; Restitution of $210. (1s - 2s)

18:924C.F FIREARMS (3s) Imprisonment of 210 months on Counts 1s & 2s, to be served concurrently, and a term of 120 monhs on Ct 3s, to be served consecutively to terms imposed on Cts 1s & 2s, for a total of 330 months; Deft remanded to custody of USM; Supervised Release of 3 years on each of Cts 1s & 2s,all to run concurrently; Special Assessment of $150; Restitution of $210. (3s)

Offense Level (opening): 4

Terminated Counts: Disposition

18:1951.F EXTORTION, RACKETEERING, & THREATS (1)

Counts Superseded (1) (obstruction of commerce by robbery)

(1)

18:924C.F FIREARMS (use of firearm during crime of violence) Counts Superseded (2)

(2)

26:5861D.F FIREARMS & WEAPONS Counts Superseded (4)

(possession of sawed off shotgun not registered)

(4)

26:5861D.F FIREARMS & WEAPONS Found not guilty by jury

(5s) (5s)

18:922G.F FIREARMS (felon in possession) Counts Superseded (6)

(6)

18:922G.F FIREARMS Found not guilty by jury

(7s) (7s)

Offense Level (disposition): 4

Complaints: NONE

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